DAVIES v. MANN: THEORY OF CONTRIBUTORY NEGLIGENCE.

THE importance of the case of Davies *v.* Mann[1] consists in this, that it led the way in introducing a principle, now firmly established in England, which was a distinct addition to the theory of contributory negligence. The general result of the cases[2] before Davies *v.* Mann, none of them, however, being of commanding importance, except, perhaps, Butterfield *v.* Forrester, is embraced in the proposition, that if the plaintiff was guilty of any negligence contributing to cause the injury complained of, he could not in any circumstances recover.

Davies *v.* Mann was decided in 1842. The facts, substantially as set forth in the reported case, are as follows: The plaintiff, having fettered the fore-feet of an ass belonging to him, turned it into a public highway, where at the time of the injury it was grazing, on the off side of a road about eight yards wide. The defendant's wagon, with a team of three horses, coming down a slight descent at what a witness termed "a smartish pace," ran against the ass and knocked it down, inflicting injuries from which it died soon after. The ass was fettered at the time, and it was proved that the driver of the wagon was some little distance behind the horses.

In addition to other instructions, the judge at the trial directed the jury, that "if they thought that the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff." The jury returned a verdict for the plaintiff, and the defendant moved for a new trial on the ground of misdirection.

During the argument in the Court of Exchequer, Parke, B., pointed out that it must be assumed that the ass was lawfully in

[1] 10 M. & W. 546.

[2] Butterfield *v.* Forrester, 11 East, 60 (1809); Vanderplank *v.* Miller, M. & M. 169 (1828); Lack *v.* Seward, 4 C. & P. 106 (1829); Vennall *v.* Garner, 1 C. & M. 21 (1832); Pluckwell *v.* Wilson, 5 C. & P. 375 (1832); Williams *v.* Holland, 6 C. & P. 23; S. C. 10 Bing. 112 (1833); Luxford *v.* Large, 5 C. & P. 421 (1833); Bridge *v.* Grand Junction Ry. Co., 3 M. & W. 244 (1838); Raisin *v.* Mitchell, 9 C. & P. 613 (1839).

the highway, as it was so alleged in the declaration, and that allegation was not denied by the defendant. The Court of Exchequer sustained the direction to the jury, and Baron Parke, in his opinion, which is more full than that of Lord Abinger, the other barons delivering no reported opinions, says: —

"This subject was fully considered by this court in the case of Bridge *v.* The Grand Junction Railway Co., where, as appears to me, the correct rule is laid down concerning negligence; namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could, by ordinary care, have avoided the consequences of the defendant's negligence." "The judge simply told the jury that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway, was no answer to the action, unless the donkey's being there was the immediate cause of the injury; and that, if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast, or, which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his action. All that is perfectly correct; for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."[1]

Since the ass was lawfully in the highway, the words "although the ass may have been wrongfully there," in the above passage, must mean negligently there, and the argument of the court, supposing it to be addressed directly to the defendant, may be stated thus: Granting that the plaintiff was negligent in leaving the ass in the highway, and that his negligence contributed to the injury he now complains of, it was still your duty to travel along the road with due care, so as to avoid accidents; and not having done so, you are liable for the injury resulting.

There is nothing in the facts to show that the defendant's conduct was wilful, and the last clause of the passage quoted has therefore no application to the case. The passage is also open to criticism upon another ground. The argument there suggested is, that if the defendant were not held responsible for run-

[1] 10 M. & W. 541.

ning over the ass negligently, he could not be held for running over it purposely or wilfully. But that does not follow; for the law is well settled that if a man purposely or wilfully does damage to another, contributory negligence of the plaintiff is not a defence.[1] If the act of a defendant sounds in *dolus, culpa* is out of the case.

Bridge *v.* Grand Junction Railway Co., although referred to by Baron Parke in support of his decision, has not usually been cited as an important case in connection with the rule in Davies *v.* Mann. It is chiefly conspicuous for the support it lent to Thorogood *v.* Bryan,[2] and was an important authority for consideration in the decisions[3] overruling that case.

The rule in Davies *v.* Mann was received with approval by the English courts, and has been applied in a number of important cases,[4] one of which, and the last in which the principle was directly involved, was carried to the House of Lords, where that principle was distinctly affirmed. In one of the intervening cases, Dowell *v.* Steam Navigation Co, Davies *v.* Mann was explained as a case where the negligence of the plaintiff was not contributory within the meaning of the law of contributory negligence. But in Radley *v.* London & Northwestern Railway Co., Lord Penzance, in moving for judgment and stating the established law of contributory negligence, forever set aside that explanation of Davies *v.* Mann. His lordship said:—

"The law in these cases of negligence is, as was said by the Court of Exchequer Chamber, perfectly well settled and beyond dispute. The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident.

"But there is another proposition equally well established, and

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[1] 2 Thompson, Negligence, 1160; Ruter *v.* Foy, 46 Iowa, 132.

[2] 8 C. B. 115.

[3] The Bernina, 12 P. D. 58; s. c. *nom.* Mills *v.* Armstrong, 13 App. Cas. 1.

[4] Mayor of Colchester *v.* Brooke, 7 Q. B. 339 (1845); Dimes *v.* Pettey, 15 Q. B. 276 (1850); Dowell *v.* Steam Navigation Co., 5 El. & Bl. 195 (1855); Tuff *v.* Warman, 2 C. B. N. S. 740 (1857); 5 C. B. N. S. 573 (1858); Witherley, admrx., *v.* Regents Canal Co., 12 C. B. N. S. 2 (1862); Springett *v.* Ball, 4 F. & F. 472 (1865); Radley *v.* London & Northwestern Ry. Co., L. R. 9 Ex. 71 (1874); L. R. 10 Ex. 100 (1875); 1 App. Cas. 754 (1876). See also Spaight *v.* Tedcastle, 6 App. Cas. 217 (1881); Cayzer *v.* Carron Company, 9 App. Cas. 873 (1884).

it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.

"This proposition, as one of law, cannot be questioned. It was decided in the case of Davies *v.* Mann, supported in that of Tuff *v.* Warman, and other cases, and has been universally applied in cases of this character without question."[1]

This opinion was assented to by Lord Blackburn and Lord Gordon, and emphatically by Lord Cairns. In the recent case of The Bernina, Lord Esher[2] and Lord Justice Lindley[3] stated the law substantially in the same terms.

The case of Davies *v.* Mann being thus approved and established in England, and also in Ireland,[4] is generally stated to be law in the United States;[5] but a very brief examination of cases will show that Davies *v.* Mann, although cited without criticism by our courts, is generally cited as an authority for the proposition that if the plaintiff is guilty of any negligence contributing directly, or as a proximate cause, to the injury complained of, he cannot recover.[6] The further question, whether the defendant could by the use of due care avoid the consequences of the plaintiff's negligence, is ignored; and Davies *v.* Mann is explained as a case where the plaintiff was allowed to recover because his negligence was not contributory.[7]

From American text-writers, on the other hand, the case of Davies *v.* Mann has met with great disapproval. It has been

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[1] 1 App Cas. 758–9.

[2] 12 P D. 61, (5.)

[3] 12 P. D. 89, 3, (*b.*)

[4] Scott *v.* Dublin & Wicklow Ry Co., Ir. R. 11 C. L. 377.

[5] "We know of no court of last resort, in which this rule is any longer disputed." Shearman and Redfield, Negligence (4th ed.), § 99.

[6] "The rule in Davies *v.* Mann has been misunderstood and misapplied. It means only that negl gence upon the part of the plaintiff which bars his recovery from the defendant must have been a proximate cause of the injury," etc. Patterson, Railway Accident Law, 55.

[7] "In Davies *v.* Mann, 10 M. & W. 546, the plaintiff negligently left his donkey in a public street, with his fore legs fettered, and the defendant drove over him carelessly. It was held that the plaintiff could recover, notwithstanding his negligence, it being a condition, but not a contributing cause, of his injury." Marble *v.* Ross, 124 Mass. 44, 48, per Morton, J.

attacked upon various grounds, but principally as being a nullification of the whole doctrine of contributory negligence.[1]

As this case is a qualification upon the general doctrine of contributory negligence, let us first inquire what is the foundation of that doctrine itself. One view, and perhaps the prevailing view, is, to ascribe it to the maxim, *in jure non remota sed proxima causa spectatur*.[2] The plaintiff cannot recover because he is himself the proximate cause of the injury; and conversely, a plaintiff's negligence in order to defeat his action must be a proximate cause. Another view is that the plaintiff is in the condition of a joint tort-feasor, seeking to recover indemnity for his own wrong.[3] A third view is, that the plaintiff is disentitled because he is himself partly to blame for the injury. This last may not be properly classified as a distinct view or theory of the subject, but rather as another method of stating either or both of the first two views; but it is a form of statement which points to a moral standard as the foundation of the law, and has the sanction of use by a judge of the highest rank and authority.[4] Still other views have been advanced, as that the plaintiff falls under the maxim *volenti non fit injuria*. But a series of cases in England under the Employers' Liability Act of 1880 has brought out so clearly the distinction between contributing to an injury by an act or omission, which is or may be contributory negligence, and consenting to it without a negligent act or omission, which is the case intended by the maxim, that further discussion of that view is superfluous.[5]

In the light of those theories let us examine Davies *v.* Mann.

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[1] 2 Thompson, Negligence, 1156; Beach, Contributory Negligence, 10, 11 *et passim*; Bishop, Non-Contract Law, § 463, note 2; Contributory Negligence and the Burden of Proof, N. Y. St. Bar Ass. 6: 198, by Edward E. Sprague, Esq., being the Prize Essay of 1882. This is a strong but discriminating condemnation of the rule in Davies *v.* Mann.

[2] "It [contributory negligence] rests upon the view that though the defendant has in fact been negligent, yet the plaintiff has by his own carelessness severed the casual connection between the defendant's negligence and the accident which has occurred; and that the defendant's negligence accordingly is not the true proximate cause of the injury." Thomas *v.* Quartermaine, 18 Q. B. D. 685, 697, per Bowen, L. J. So Pollock, Torts, 374; and Wharton, Negligence, § 133.

[3] Sprague, Contributory Negligence and the Burden of Proof, 3, 4 (in pamphlet); Bishop, Non-Contract Law, § 460.

[4] Lord Blackburn, in Cayzer *v.* Carron Company, 9 App. Cas. 873, 880, 881.

[5] Weblin *v* Ballard, 17 Q. B. D. 122; Thomas *v.* Quartermain, 17 Q. B. D. 414; 18 Q. B. D. 685; Yarmouth *v.* France, 19 Q. B. D. 647; Thrussel *v.* Handyside, 20 Q. B. D. 359; Osborne *v.* London & North Western Ry. Co., 21 Q. B. D. 220; Membery *v.* Great Western Ry. Co. 14 App. Cas. 179.

The plaintiff's negligence consists in the act of leaving the donkey fettered in the highway. That is the last act done by him before the accident, and his subsequent intervening conduct has no connection with the case. For the accident which follows, applying the test of moral or personal blame, if he had ordinary intelligence, he is to blame at least in part, and there are strong grounds for holding him as much to blame as the defendant. His want of care and the defendant's want of care are each necessary elements in the result. Remove either, and the mischief would not have happened.

If, again, a man guilty of contributory negligence is to be treated as a joint tort-feasor, the plaintiff in Davies *v.* Mann is a joint tort-feasor, and is seeking to obtain indemnity for his own wrong. The damage complained of is the result of his negligence and the defendant's negligence conjoined But this is an inapt and unfortunate form of statement ; for a joint tort-feasor the plaintiff cannot be. He owes no legal duty to himself to take due care of himself or of his property, and as he has violated no legal duty to the defendant and done him no damage, he has committed no tort. Whatever of truth there is in this theory of contributory negligence, — the same principle being also sometimes put in the forms that the plaintiff must come into court with clean hands, and that no man can take advantage of his own wrong, — is embraced under another principle, not yet mentioned, to be discussed below.

Finally, if a plaintiff cannot recover because his negligence is a proximate cause of the injury, the negligence of the plaintiff in Davies *v.* Mann is, in the legal meaning of the phrase, though not perhaps in its logical or metaphysical meaning, a proximate cause. Speaking generally, if a man does or omits to do an act which is likely to result in damage, under all the circumstances known and which ought to be known to him at the time, his act or omission is the legal cause of that damage. Now in Davies *v.* Mann the plaintiff did an act which was likely to result in damage, and which did so result. The opinion of the court conceded that it was an act of negligence, and it was contributory negligence ; for although not directly conceded by the court to be contributory, that concession is understood by the English courts to be involved in the principle of the case, particularly by the House of Lords, in the passage above quoted from Lord Penzance.

If the negligence of Davies was contributory, it was also a proximate cause, for on the theory of proximate causes remote negligence is not contributory, and is not, legally speaking, a cause at all, but is disregarded. *In jure non remota sed proxima causa spectatur.* It follows that in Davies *v.* Mann the plaintiff violates every one of the principles thus far given as the foundation of the law of contributory negligence. Yet he is allowed to recover.

It is submitted that there is another principle upon which to rest the law of contributory negligence. When a plaintiff seeks redress in a court of law for a tort, the rule which the court may apply will not only settle the dispute against him or in his favor, but it will have a further and more lasting office as a precedent binding upon all members of the community in a similar case. The community, therefore, has an interest in the result, and the needs of the community should have an influence upon the rule to be laid down. That they do have an influence is beyond dispute.[1]

In an action for negligence it is of no consequence to the law whether the particular defendant shall be compelled to pay damages, or whether the loss shall be allowed to lie where it fell. The really important matter is to adjust the dispute between the parties by a rule of conduct which shall do justice if possible in the particular case, but which shall also be suitable to the needs of the community, and tend to prevent like accidents from happening in future. The reason why a plaintiff who is guilty of contributory negligence can recover no damages is to a large extent a matter of sound policy or legislation; and this view has been suggested at least, if not directly stated, by judicial authority. In the Ohio case of Davis *v.* Guarnieri, Owen, C. J., in laying down three considerations upon which the doctrine of contributory negligence is based, gives this as the last: "(3) The policy of making the personal interests of parties dependent upon their care and prudence."[2] Why the common law in cases of contributory negligence should not divide the loss is a question to which different answers have been suggested,[3] but which remains a puzzle to judges of great ability;[4] just as the opposite rule in Admiralty,

[1] See Holmes, Common Law, p. 35, for a fine passage upon this topic.

[2] 45 Ohio St. 471, 489.

[3] Bishop, Non-Contract Law, § 460, note 3.

[4] Per Lindley, L. J., 12 P. D. 58, 89.

which does divide the loss, has perplexed high authorities among the civilians.[1] But the practice being thus established of depriving the plaintiff of all remedy, the ultimate justification of the rule is in reasons of policy, viz., the desire to prevent accidents by inducing each member of the community to act up to the standard of due care set by the law. If he does not, he is deprived of the assistance of the law. How much influence the rule exerts to accomplish the object aimed at cannot be known. That it does exert some influence is sure. A plaintiff who has learned the law of contributory negligence by the hard experience of losing a verdict is likely to be more careful in future. From his negligence, at least, accidents will be less likely to happen.

The general doctrine of contributory negligence being thus founded upon considerations of policy, the rule in Davies *v.* Mann, which is a part of that doctrine, rests upon the same ground. The plaintiff negligently left the donkey fettered upon the road, and the defendant some time afterward carelessly ran over it. To prevent an injury is a better service than to award compensation for an injury already done; and if it be any part of the policy of the law to prevent accidents, and if it have any means at its command to accomplish the object, the negligence of the defendant in Davies *v.* Mann is the negligence at which the law ought to strike. The negligence of the plaintiff having placed the animal in a situation of danger, the defendant had a full opportunity to avoid the peril by due care, which he did not use. The negligence of each is a necessary element, but that of the defendant is nearer to the accident. The plaintiff did an act from which harm was likely to follow; from the defendant's negligence harm was bound to follow.

It may be said that this is merely another way of stating that the negligence of the defendant is the sole proximate cause, and that of the plaintiff remote, and therefore the whole question comes back to the theory of proximate cause. The answer is, that although the negligence of the plaintiff is more remote from the accident than that of the defendant, it is still near enough to be contributory negligence, and is so conceded to be by the House of Lords, and is therefore a proximate cause; and on the theory of contributory negligence which holds that a plaintiff is disentitled

[1] See Marsden, Law of Collisions (2d ed.), 132–134.

to recover whenever his own negligence is a proximate cause of his injury, the plaintiff in Davies *v.* Mann ought not to recover. Another suggestion which may be made by the advocate of proximate causes is, that the negligence of the defendant in Davies *v.* Mann succeeded that of the plaintiff in time, and that the effect of the case is to decide that where there are several causes, the last cause to operate in point of time is the true proximate cause. The answer is, that the rule in Davies *v.* Mann does not inquire whether the defendant was guilty of the last negligence, but only whether he had an opportunity to avoid the accident by the use of due care. If he had, and the plaintiff had not, which was the fact in Davies *v.* Mann, he is liable.

Before proceeding to examine more closely the application of the rule in Davies *v.* Mann to different conditions of fact, a matter by no means free from difficulty, two other points of a general nature must be noticed.

1. To compel the defendant in Davies *v.* Mann to pay the whole damage, when the plaintiff is also at fault, may be said to operate as a punishment upon the defendant. So it may also be said that to deprive the plaintiff of all compensation in other cases of contributory negligence, where the rule in Davies *v.* Mann does not apply, and where the negligence of the plaintiff may be only a small element in the accident, operates as a punishment upon him. It may be conceded that there is a punitive element in each of those cases ; and if the law of contributory negligence is founded upon considerations of policy, the punitive element can be readily explained and understood.

2. But it may be asked, if the idea of punishment is involved in Davies *v.* Mann at all, why does not that admit the doctrine of comparative negligence which prevails in Illinois and several other States? By that rule, "the degrees of negligence must be measured and considered ; and wherever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action."[1] It is perfectly plain that there is no logical connection between the rule in Davies *v.* Mann and the doctrine in the passage quoted, which is from the case where comparative negligence first appeared. No comparison of the negligence of the plaintiff and of the defendant is made

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[1] Galena & Chicago Union R.R. Co. *v.* Jacobs, 20 Ill. 478, 497, per Breese, J. (1858).

in Davies *v.* Mann. The question is, Can the defendant avoid the consequences of the plaintiff's negligence? If he can, then, although his negligence may be slight in comparison with that of the plaintiff, he is obliged to pay the whole damage.

It remains to apply the rule in Davies *v.* Mann to cases with different facts.

1. Suppose the defendant, or the driver, in Davies *v.* Mann, instead of being a short distance behind his horses, had stopped by the way in a public house, and allowed the horses to go on ahead, and that when the accident occurred he was a mile behind them, and they were not in sight. What rule is to be applied? Neither plaintiff nor defendant is on the ground at the time of the accident, and the negligence of the defendant consists in allowing the horses to go on alone. His negligence is equally remote from the accident with that of the plaintiff, and although it may be more blameworthy to allow a team of three horses to go alone upon the highway than to leave a donkey fettered there, that cannot affect the result. The rule in Davies *v.* Mann requires the defendant to use due care to avoid the consequences of the plaintiff's negligence, but in this case he could not, after the peril was imminent, do anything to avoid the accident. The principle of Davies *v.* Mann has therefore no application, and the case falls under the general proposition of contributory negligence. The plaintiff's negligence contributes to his injury, and he cannot recover.

In the Pennsylvania case of Stiles *v.* Geesey,[1] the facts were similar to those here supposed, and the plaintiff failed in his action, upon the general ground that he was guilty of contributory negligence. The relation of Davies *v.* Mann to the case was not considered.

2. Suppose the plaintiff in Davies *v.* Mann was himself actually present by the roadside at the time of the accident, and negligently allowed the donkey to remain in the way of the approaching team, the other facts remaining unchanged. In this case, by the use of due care, he could avoid the injury as well as the defendant. It is his duty so to do, and on these facts it is submitted he could not recover. It would be the grossest inequality and injustice to impose upon the defendant the duty of avoiding the consequences

[1] 71 Penn. St. 439.

of the plaintiff's negligence where he can do so by the use of due care, unless a corresponding duty were imposed upon the plaintiff.

This result also follows as a matter of authority from Butterfield *v.* Forrester.[1] There, the plaintiff, while riding violently through the streets of Derby at nightfall, ran against an obstruction which had been placed across the highway by the defendant, and fell, with his horse. After a verdict for the defendant, Lord Ellenborough, in refusing a rule for a new trial, said: "One person being in fault will not dispense with another's using due care for himself. Two things must concur to support this action: an obstruction in the highway, and no want of ordinary care to avoid it on the part of the plaintiff."[2] In Butterfield *v.* Forrester, the defendant was not present at the time and place of the injury, and in that respect the case differs from the one here supposed; but Butterfield *v.* Forrester imposes upon the plaintiff the same duty of avoiding the consequences of the defendants's negligence, which in Davies *v.* Mann is imposed upon the defendant to avoid the consequences of the plaintiff's; and that duty, if it exists at all, must exist when the opposite party is present as well as when he is absent. Butterfield *v.* Forrester has been said to be irreconcilable with Davies *v.* Mann;[3] but in answer to that criticism it may be observed that Butterfield *v.* Forrester was referred to with approval by Baron Parke in Bridge *v.* Grand Junction Ry. Co., in a passage which he quotes and reaffirms in Davies *v.* Mann. Moreover, it is one of the oldest cases in the law of contributory negligence, having been decided in 1809, and has ever since been unquestioned law. So far from being in conflict with Davies *v.* Mann, it is the exact converse[4] of Davies *v.* Mann; and the two cases are to be considered as illustrations of the working of the same great principle, — the duty of one person to avoid the consequences of another's negligence, — applied to different facts.[5]

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[1] 11 East, 60. [2] 11 East, 61.

[3] "The two rules, placed side by side, as some courts are in the habit of placing them, contradict each other and make nonsense." 2 Thompson, Negligence, 1155.

[4] See The Bernina 12 P. D. 58, 62, (8) per Lord Esher; and *id.* 89, 3, (*a*) per Lindley, L. J.

[5] An article reviewing Beach on Contributory Negligence, in 2 Law Quarterly Review, 506, presumably from the pen of Sir Frederick Pollock, by adding certain facts in Radley *v.* London & North Western Ry. Co., presents a case similar, but not identical, with that presented above, by changing the facts in Davies *v.* Mann. The Radley case was an action for negligently pushing empty trucks against the plaintiff's bridge, whereby it was thrown down, the plaintiff or his servants not being at the time on the ground. The

3. Suppose that the plaintiff in Davies *v.* Mann was present by the roadside with the donkey, and that half an hour before the accident occurred he had fallen asleep, and was asleep at the time of the accident, the other facts remaining the same. What rule is to be applied? In Davies *v.* Mann, Baron Parke puts the case of negligently running over a man lying asleep in the highway, and implies that the injured man could recover. If so, it follows that the duty of the plaintiff to avoid the consequences of the defendant's negligence exists only when the plaintiff has full capacity, after the peril is imminent, to use due care.

4. Again, it may be supposed that the plaintiff in Davies *v.* Mann was present at the time of the accident, but so intoxicated that he was incapable of exercising care. What rule is to be applied? This case is like the last in this respect, that the plaintiff in point of fact has no capacity to avoid the accident, any more

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additional facts supposed were, that a servant of the plaintiff was on the bridge after it was in imminent peril, but stood by and failed to give the alarm; while the defendant's servants felt the resistance of the bridge soon after the plaintiff's servant saw it in danger, and instead of stopping the trucks to investigate, stupidly pressed on. The learned author of the article referred to assumes that the plaintiff could still recover, and sums up the law in this general rule: "The result is, that the party *who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent*, is considered solely responsible for it; and this will be found, we believe, to be true in all such cases, whether the series be long or short." This rule apparently rests upon the theory that contributory negligence is wholly a question of proximate cause, and if the assumption is correct, it follows logically that the person guilty of the last negligence, whether it be an act or an omission, is alone responsible; for his negligence is the sole proximate cause. It also follows logically that wherever the plaintiff's negligence precedes that of the defendant, it is not *contributory* negligence; and that the rules of contributory negligence can apply only where the negligence of the plaintiff is concurrent and simultaneous with that of the defendant. But the cases of Davies *v.* Mann and Radley *v.* London & North Western Ry.Co. are cases of successive negligence, and are considered by the courts to be cases of contributory negligence also. This shows that the logical theory of proximate causation is not the basis, or, at any rate, not the sole basis, of contributory negligence.

In the case where both plaintiff and defendant have been guilty of negligence contributing to the accident, and both are present at the time of the accident, the true question is believed to be this: Could the accident, after the peril was imminent, be avoided by either party, by the use of due care? If it could, the one who fails to use due care to avoid, cannot recover. It cannot be said as matter of law, when both parties are present, that it is negligence on either side not to avoid, or to take precautions to avoid, the consequences of the other's negligence. Thus in Spaight *v.* Tedcastle, 6 App. Cas. 217, both parties were present at the time of the accident, and the plaintiff recovered, but on the ground that he, or the pilot in charge of his vessel, was not guilty of any negligence when the peril was imminent. Washington *v.* Baltimore & Ohio R.R. Co., 17 W. Va. 190, which presents similar facts, and contains an elaborate review of authorities, goes upon the same ground.

than if he was not upon the ground. But in this case the incapacity is due to a cause which the law ought to restrain. The general rule undoubtedly is, that if a man is injured while intoxicated, the intoxication alone is not a bar to his action.[1] But an intoxicated man is in constant danger of inflicting harm through negligence, and if, while in that state, he receives an injury through negligence of another, which he has no capacity to avoid, why may not the law say, upon grounds of policy, that his incapacity, being due to his own folly, shall be no excuse? Upon authority, however, it must be said that this case has been put several times by judges, and always with the implication that the plaintiff could recover.[2] In Nashville & Chattanooga R. R. *v.* Smith,[3] plaintiff's intestate was intoxicated and on the track of the defendant at the time of the accident, and the same was the fact in O'Keefe *v.* Chicago, Rock Island, & Pacific R. R.,[4] and in Button *v.* Hudson River R. R. Co.[5] But in each of those cases the result was made to depend upon general questions, the rule in Davies *v.* Mann, or the duty or capacity to avoid the accident after the peril is imminent, not being clearly presented or discussed.

5. It is obvious that the last two cases considered may also arise with reference to the defendant. Suppose that in Davies *v.* Mann the driver at the time of the accident had been asleep upon his wagon, or so drunk that he was incapable of using due care to avoid the donkey, the other facts remaining the same. The case where the driver is intoxicated has been put by way of illustration from the bench,[6] with a strong implication that the plaintiff might

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[1] 2 Thompson, Negligence, 1174.

[2] "If a man is lying drunk on the road, another is not negligently to drive over him. If that happened, the drunkenness would have made the man liable to the injury, but would not have occasioned the injury." Coleridge, J., in Clayards *v.* Dethick, 12 Q. B. 439, 445. So Blackburn, J., in Radley *v.* London & North Western Ry. Co., L. R. 10 Ex. 100, 105; Ellsworth, J., in Isbell *v.* New York & New Haven R. R., 27 Conn. 393, 404.

[3] 6 Heisk. 174. [4] 32 Iowa, 467. [5] 18 N. Y. 248.

[6] "If in Davies *v.* Mann the driver of the wagon, if in Tuff *v.* Warman the crew of the steamer, had become half an hour before the collision so drunk that their arms were powerless, and if they were still in the same state of drunkenness when the collison occurred, the defendant in each of those cases, according to the argument of the present defendants in support of this exception, must have been exempt from responsibility. Nay, more; if they had been only partially drunk, so as to have retained the voluntary use of their arms, the defendants would be liable; but if they were so thoroughly drunk as to have lost muscular power, the defendants would be exempt from all responsibility, according to rule of instruction for the jury suggested by the thirteenth exception." Scott *v.* Dublin & Wicklow Ry. Co., Ir. R. 11 C. L. 377, 395, per Pigot, C. B.

recover. There can be little doubt that this is the result which would be reached by the court in a case like the one supposed. But it is submitted that the same rule should be applied to a plaintiff in the like situation; and that wherever one person, present at the place of the accident, is incapacitated, by a cause due to his own fault, from using due care to avoid the consequences of another's negligence, he should be held to the same standard of care as if the incapacity did not exist.

The results of these several cases, and of the discussion thus far, may be summarized thus: —

The general rule of contributory negligence, founded largely, if not wholly, upon considerations of public policy, is this: that if a plaintiff has been guilty of any negligence which contributed proximately to the injury, he cannot recover. But it is the duty of both plaintiff and defendant to use due care to avoid the consequences of each other's negligence. If the defendant alone can avoid the accident by the use of due care, and does not, the plaintiff may recover. If the plaintiff alone can avoid it, and does not, he cannot recover. If both can avoid it, neither can recover. If neither can avoid it, the general rule applies, and the plaintiff cannot recover.

A few more questions remain to be considered. It has already been said that the principal objection to the rule in Davies *v.* Mann is, that it does away with the entire law of contributory negligence. Davies *v.* Mann, it is said, decides that the plaintiff can recover damages for an injury sustained by him if the defendant by the use of due care could avoid doing the injury. But a defendant is never liable for negligence except in the case where he could avoid doing the injury by the use of due care. Therefore, negligence of a plaintiff is never a bar to his action. The answer is, that the rule of Davies *v.* Mann does not apply to every case of contributory negligence, but only to those cases where the defendant is on the ground and by the use of due care can avoid the injury. Outside of that limited class of cases the general rule, embraced in the first proposition of Lord Penzance, has full and unrestricted application.

It has been suggested that the rule in Davies *v.* Mann should be modified in the manner following: "Although the plaintiff has negligently exposed himself or his property to an injury, yet if the defendant, *after discovering the exposed situation,* inflicts the

injury upon him through a failure to exercise ordinary care, the plaintiff may recover damages." [1] In Davies *v.* Mann the defendant did not discover the peril before the accident, but he was held bound to use due care independent of the fact of discovery, so that the rule here suggested is a different rule from that in Davies *v.* Mann.[2] If the defendant had discovered the peril and had not used due care to avoid it, that fact would be strong evidence, and in some cases almost conclusive evidence, of wilfulness. And, as has been already stated, if the act of the defendant is wilful, negligence is out of the case. The discovery of a danger, under the rule in Davies *v.* Mann, is of no importance except in so far as it tends to prove wilfulness.

Finally, in an able essay already referred to, it is urged that the rule in Davies *v.* Mann should be discarded, and that there are two other well-established principles "which fix liability upon a defendant in every case where liability can properly be imposed."[3] Those principles are: (1) that remote negligence of the plaintiff is not in law contributory, and (2) that contributory negligence is no defence for a wilful wrong. But if the suggestions here offered are well founded, the rule in Davies *v.* Mann has a field of usefulness outside of either of those principles; and it rests upon sufficient grounds.

William Schofield.

CAMBRIDGE, December, 1889.

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[1] 2 Thompson, Negligence, 1157, note 1.

[2] The rule requiring a defendant to use due care to avoid the consequences of discovered negligence prevails in several States. See Isabel *v.* Hannibal & St. Joseph R. R., 60 Missouri, 475; Morris *v.* Chicago, Burlington, & Quincy Ry., 45 Iowa, 29; Woods *v.* Jones, 34 La. Ann. 1086.

[3] Sprague, Contributory Negligence and the Burden of Proof, p. 7 (in pamphlet).